STATE OF MICHIGAN
COURT OF APPEALS

In re Estate of ESTHER MAY MAYES, Deceased.

MICHON FELTON,

Petitioner-Appellant,

v

HAROLD MAYES, II,

Respondent-Appellee.

UNPUBLISHED
August 17, 2006

No. 260799
Clinton Probate Court
LC No. 04-025735-DA

Before: Zahra, PJ, Neff and Owens, JJ.

PER CURIAM.

Petitioner appeals as of right from a final order granting summary disposition in favor of respondent. We reverse and remand for further proceedings consistent with this opinion.

Decedent Esther May Mayes was widowed in 1991. She had three children, petitioner Michon Felton, respondent Harold Mayes, II, and Randy Mayes. Randy was physically and developmentally disabled. He was unable to live independently and lived with the decedent in her home. In early 2000, petitioner grew concerned that the decedent was unable to continue caring for Randy alone. Petitioner petitioned for and was granted guardianship of Randy in May 2000, upsetting the decedent.

Respondent stayed with the decedent in May 2000 and, about this time, he and his wife arranged to live with the decedent indefinitely. On May 23, 2000, the decedent executed a power of attorney appointing respondent her attorney in fact and granting him the power to conduct all her affairs. On June 6, 2000, the decedent executed a will expressly disinheriting petitioner and naming respondent her personal representative. In the will, the decedent granted her home to respondent and divided the remainder of the estate between respondent and a trust naming Randy as beneficiary and respondent as trustee. The will specified that the trust would terminate on Randy's death, and that respondent would receive the remaining principal and unpaid interest. Randy died in the fall of 2000. Respondent and his wife apparently lived with the decedent until her death in 2004.

After the decedent's death, petitioner petitioned the trial court to deny admission of the decedent's will to probate and find that the decedent died intestate. In particular, petitioner claimed that the will was invalid because the decedent lacked the mental capacity to execute the

will and because respondent unduly influenced the decedent to execute the will. Respondent moved for summary disposition under MCR 2.116(C)(10). The trial court agreed that no question of fact regarding these claims existed, and it dismissed petitioner's petition.

Petitioner argues the trial court erroneously found that she failed to establish a question of material fact regarding whether respondent unduly influenced the decedent to execute the will.[1] We agree.

This Court reviews de novo motions for summary disposition made under MCR 2.116(C)(10). *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). "A motion under MCR 2.116(C)(10) tests whether there is factual support for a claim." *Knauff v Oscoda Co Drain Comm'r*, 240 Mich App 485, 488; 618 NW2d 1 (2000).

> The moving party has the initial burden to support its claim to summary disposition by affidavits, depositions, admissions, or other documentary evidence. The burden then shifts to the nonmoving party to demonstrate that a genuine issue of disputed fact exists for trial. To meet this burden, the nonmoving party must present documentary evidence establishing the existence of a material fact, and the motion is properly granted if this burden is not satisfied. [*Willis v Deerfield Twp*, 257 Mich App 541, 550; 669 NW2d 279 (2003) (citations omitted).]

A party contesting a will on the ground that it was the product of undue influence has the burden of proving such influence. MCL 700.3407(1)(c). Typically, the party must establish that actual undue influence occurred; in other words, it must show that the testator "was subjected to threats, misrepresentation, undue flattery, fraud, or physical or moral coercion sufficient to overpower volition, destroy free agency and impel the grantor to act against his inclination and free will." *Kar v Hogan*, 399 Mich 529, 537; 251 NW2d 77 (1976). However, undue influence is presumed when the evidence establishes that (1) a confidential or fiduciary relationship existed between the testator and the devisee, (2) the devisee benefited from the transaction in question, and (3) the devisee had an opportunity to influence the testator's decision in that transaction. *In re Peterson Estate*, 193 Mich App 257, 259-260; 483 NW2d 624 (1991), citing *In re Mikeska Estate*, 140 Mich App 116, 121; 362 NW2d 906 (1985). "The establishment of this presumption creates a 'mandatory inference' of undue influence, shifting the burden of going forward with contrary evidence onto the person contesting the claim of undue influence." *Mikeska*, *supra* at 121. Essentially, a trier of fact may infer that a testator was unduly influenced to execute a will if it concludes that the evidence establishes the elements of the presumption. *Peterson*, *supra* at 259-260.

Respondent acknowledges that he benefited from the decedent's will. However, he argues that petitioner failed to establish a presumption of undue influence. He maintains that petitioner failed to present evidence establishing that he had a confidential or fiduciary

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[1] Petitioner does not contest the trial court's holding that she failed to establish a question of material fact regarding whether the decedent had the capacity to execute the will. Accordingly, we do not address this issue.

relationship with the decedent and that he had the opportunity to influence her decision to execute her will. We disagree.

A fiduciary relationship exists when one reposes faith, confidence, and trust in and relies on the judgment and advice of another. *In re Jennings' Estate*, 335 Mich 241, 244; 55 NW2d 812 (1952). Typically, "[t]he existence of a confidential relationship or fiduciary relationship is a question of fact." *Taylor v Klahm*, 40 Mich App 255, 264; 198 NW2d 715 (1972). However, this Court has recognized that a fiduciary relationship exists as a matter of law from the grant of a power of attorney. *In re Susser Estate*, 254 Mich App 232, 236; 657 NW2d 147 (2002). On May 23, 2000, the decedent executed a power of attorney appointing respondent her attorney in fact. Respondent argues that no fiduciary relationship existed between him and the decedent when she executed the contested will, regardless of the existence of the power of attorney, because, at the time she executed the will, he was not aware that she had given him power of attorney, and he did not act on this power of attorney. Yet, as a matter of law, the mere enactment of the power of attorney created a fiduciary relationship between respondent and the decedent, which existed when the decedent executed the contested will days later. *Id.*

Furthermore, we find that a question of fact exists regarding whether respondent had the opportunity to influence the decedent's decision to execute the contested will. *Random House Webster's College Dictionary* (1997) defines "opportunity" as "a situation or condition favorable for attainment of a goal." The parties presented conflicting evidence regarding whether respondent was living with the decedent when she executed her will. Pauline Sheeley, the decedent's sister, claimed that respondent began living with the decedent in May 2000. Petitioner also presented a bank statement indicating that respondent listed the decedent's address as his mailing address as early as May 2000. Although respondent claimed in his deposition that he and his wife did not move from Delaware to the decedent's Michigan home until a few weeks after the decedent executed the will, respondent also stated in his deposition that he was staying with the decedent when she executed the contested will, and he brought the decedent to the attorney's office on the day the decedent signed the contested will. A reasonable factfinder, considering this evidence in a light most favorable to petitioner, could conclude that respondent was in a favorable situation to influence the decedent to execute a will benefiting him and, consequently, that he had the opportunity to influence the decedent to execute the contested will.

Petitioner presented factual support for each element establishing a presumption of undue influence. When deciding a motion for summary disposition under MCR 2.116(C)(10), the trial court must consider the evidence submitted in the light most favorable to the nonmoving party. *Scalise v Boy Scouts of America*, 265 Mich App 1, 10; 692 NW2d 858 (2005). Accordingly, the trial court erred when it granted respondent's motion for summary disposition under MCR 2.116(C)(10) and dismissed petitioner's claim that the decedent's will should be set aside because it was the product of undue influence.

Respondent argues that, even if petitioner established a presumption of undue influence, summary disposition under MCR 2.116(C)(10) was appropriate because he presented "overwhelming evidence to rebut a presumption of undue influence." However, "[w]hether the presumption of undue influence is rebutted is a question to be resolved by the finder of fact." *Peterson*, *supra* at 261. The trial court may not make findings of fact or weigh credibility in deciding a summary disposition motion. *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d

475 (1994). By presenting evidence to rebut the presumption of undue influence, respondent raised a genuine issue of material fact regarding whether the presumption of undue influence was rebutted, and summary disposition under MCR 2.116(C)(10) was not appropriate.

Reversed. Remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Brian K. Zahra
/s/ Janet T. Neff
/s/ Donald S. Owens